UNITED
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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 684

Case No. 739: ABDUL RAHIM

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 23 June 1993, Iffat Fu'ad Abdul Rahim, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA), filed an application containing a request for the production of certain documents and, inter alia, pleas for:

"...

2. Reinstating the Applicant to service, and considering her on special leave with full pay ever since she applied for reinstatement, i.e. September 1987.

3. Compensating the Applicant for the loss and injury she sustained estimated at USD 40,000.

4. Payment of secretarial and legal counsel's fees estimated at USD 2,000."

Whereas the Respondent filed his answer on 23 December 1993;

Whereas the Applicant filed written observations on 20 February 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 4 September 1961, as a Teacher at the Beisan School, Hama, North Area, on an indefinite appointment, at the grade 5 level. She was subsequently transferred to other schools in the Damascus Area. The Applicant resigned, with effect from 1 October 1986. The Applicant was employed again by UNRWA on a temporary basis, with effect from 7 October 1987, as a Teacher at the Nimreen School, Damascus Area, at the grade 6 level. Her temporary employment ended, with effect from 1 November 1987, following a memorandum from the Applicant to the Field Education Officer, which read, "I request stopping work with effect from 1 November because I refuse appointment on temporary basis."

On 29 June 1977, prior to the Applicant's first resignation, UNRWA issued staff circular No. A/5/77, advising UNRWA staff that:

> "The Agency has agreed to amend the relevant Personnel Directive to provide that if a teacher resigns from the Agency to accept another teaching post within the Middle East and he subsequently applies for re-employment by reinstatement within two years from the date of resignation, the Agency will give him priority over new candidates who are equally qualified."

With effect from 1 July 1980, personnel directive A/4/Rev.4/Amend.9, Section 3.6, extended the period of priority for re-employment of teachers from two years to three years from the date of resignation.

On 23 April 1992, the Applicant wrote to the Field Personnel Officer, Damascus, referring to a recent interview with the Director of UNRWA Affairs, SAR. She enclosed an application form for the post of Teacher.

In a reply dated 26 April 1992, the Field Administration Officer, SAR, noted that when the Applicant voluntarily resigned from the Agency's service in 1986, she had been paid all benefits due to her and ended her contractual relation with the Agency. He noted that her subsequent temporary appointment was terminated at

her request on 1 November 1987, and that she was not entitled to any further termination benefits. With respect to her request for re-employment, he stated:

> "... At the time you left the Agency, teachers who applied for re-employment within three years from the date of their resignation were given priority over new candidates who were equally qualified, but not over better qualified candidates. Besides, it appears that you resigned from employment with the Agency more than three years ago. All former staff members, including teachers, who seek re-employment with UNRWA are simply viewed as external candidates and have no priority whatsoever in employment."

On 27 May 1992, the Applicant wrote to the Field Administration Officer, SAR, noting, inter alia, that she had been applying continually for reinstatement since September 1987. Her applications in 1988, 1989, 1990, and 1991 were "with no avail on the ground that I am over age, i.e. over 35 years." She noted that she had already been older than 35 years when she resigned on the basis of the rules that provided for priority reinstatement within three years, and she requested permission to appeal directly to the Administrative Tribunal.

In a reply dated 6 July 1992, the Field Administration Officer, SAR, stated: "The Agency's position is that there is no decision that can be appealed from and, therefore, we cannot agree to your request."

On 19 July 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 29 March 1993. Its findings and recommendation read, in part, as follows:

> "III. Board Findings. ...
>
> 12. ... The Board focused on the content of paragraph 3.6 of personnel directive A/4 Rev.4 Amend.9 effective 1 July 1980 titled 'Reinstatement of Teachers' and contends that it does not invoke a contractual relation between the Agency and the Applicant in any sense.

13. The Board also considered appeal procedures as stipulated in area staff rule 111.3 and which provide that only 'a staff member' can file an appeal against a disciplinary measure or anything that touches on the terms of his/her appointment.

14. In this context the Board finds that the Applicant's case does not qualify to invoke the competence of the Board as the matter raised is outside its jurisdiction and at the material time of the application, the Applicant did not enjoy the status of a staff member of the Agency.

IV. Recommendation

15. In view of the foregoing, the Board submits it lacks jurisdiction to entertain such an appeal and therefore, without prejudice to any other submissions as may become necessary, unanimously makes its recommendation to declare this appeal unreceivable."

On 13 May 1993, the Commissioner-General transmitted a copy of the JAB report to the Applicant, and informed her that he accepted the JAB's recommendation.

On 23 June 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB ruled unfavourably on the Applicant's case, and her application to the Tribunal was filed within the time-limits provided by the Statute and Rules of the Tribunal. It is therefore receivable.

2. The Applicant had the right, at the time she resigned from the Agency, to priority consideration for re-employment within three years of her resignation.

3. The decision of the Respondent not to reinstate the Applicant is flawed by mistake of fact, error of law, prejudice against acquired rights, age discrimination, and unjust enrichment.

Whereas the Respondent's principal contentions are:

1. The Tribunal does not have jurisdiction over the matters raised by the Applicant, as the Area Staff Regulations and Rules

governing her appointment when she resigned from service and when she applied for re-employment did not provide for such jurisdiction.

2. The Applicant's claim against the Respondent is time-barred, as she seeks review of an Agency decision made in 1987 and did not file an appeal with the JAB until 19 July 1992.

3. The decision as to whether to re-employ the Applicant is inherently discretionary. The Applicant does not make any allegation of prejudice in the Respondent's decision.

The Tribunal, having deliberated from 21 October to 11 November 1994, now pronounces the following judgement:

I. At the outset, the Tribunal considered the Applicant's preliminary pleas asking the Respondent to produce certain documents and concluded that the material before the Tribunal was adequate for examining the principal issues in this case. Accordingly, the request for further documents was denied.

II. The main questions raised by the Applicant are practically the same as those the Tribunal considered in its Judgement No. 650, Bakr et al. Judgement No. 650 was rendered on 20 July 1994, while the present application was filed on 23 June 1993, i.e. about a year before Judgement No. 650. In that judgement, the Tribunal discussed the issues and came to some definitive conclusions which are applicable in this case.

III. First, the Tribunal held that the local UNRWA staff governed by the Area Staff Regulations cannot be deprived of, far less totally denied, their right to be properly heard by an independent judicial body. In this context, the Tribunal took the view "that it was not precluded from hearing cases involving staff members such as the Applicants, there being no other judicial forum for dealing with such." After referring to the Advisory opinion of the International

Court of Justice of 13 July 1954, the Tribunal concluded that there was no justification in "fairness and equity" to deny the Applicant(s) as area staff members recourse to an external judicial body while allowing such recourse for international staff members. Therefore, consistent with its previous ruling, the Tribunal rejects the plea that it is without competence "ratione materiae". For similar reasons of fairness and justice, the Tribunal could not endorse the view that because of practical and administrative difficulties, the staff members governed by Area Staff Regulations should be denied the basic elements of justice.

IV. The Respondent's argument, which denies the competence of the Tribunal on the ground of ratione temporis, must also fail as, at the time of the revision of the Area Staff Rules, in June 1991, there was no indication that the old system (of no recourse to the Tribunal and only a limited system of internal recourse in the event of termination) would continue to prevent staff members from seeking redress from the Tribunal. "If it had been the intention to perpetuate that position, the provision extending the jurisdiction of the Tribunal should have provided expressly for this result." (Judgement No. 650, Bakr et al., paragraph XVIII)

V. Inasmuch as the Applicant was a former staff member, the contractual obligations between the parties may be considered to subsist and may affect any prospective actions related to the earlier employment. This indeed is the view the Tribunal took in Judgement No. 650, holding that "the fact that the Applicants were not staff members does not necessarily deprive them of recourse. These, of course, are former staff members who filed appeals relating to alleged non-observance of the terms of their contracts of employment." (Judgement No. 650, Bakr et al., paragraph XIV)

VI. The Tribunal finds that the Applicant was not given priority when she originally applied for re-employment within the requisite

time period. The Tribunal notes that the Applicant applied several times for re-employment and finds that she is not time-barred in her application because her efforts to gain re-employment were continual. They began well within the period during which she was entitled to priority consideration and they continued to 1992, culminating in her decision to seek recourse. Although there is no guarantee that the Applicant would have been re-employed even if she had been given priority, she suffered a denial of rights for which she is entitled to compensation.

VII. The Applicant notes that requirements for the employment of teachers were changed and that she was consequently denied consideration on the basis of factors which were not present or known to her when she resigned. The Tribunal considers that the Applicant's right, as a former teacher, to priority consideration for re-employment within three years of separation, should not have been eclipsed by the imposition of requirements, without her knowledge, which made priority consideration of her re-employment impossible.

VIII. In view of the foregoing, the Tribunal orders that:

(i) The Applicant be accorded priority for the teaching posts in UNRWA for which she applies and for which she is qualified; and

(ii) If the Applicant is not appointed within 9 months from the date of this judgement to a suitable post in UNRWA, the Respondent pay to the Applicant compensation, for the injury referred to in paragraph VI above, equivalent to 12 months of her net base salary at the rate in effect at the time of the Applicant's resignation.

(iii) All other pleas are rejected.

(Signatures)

Samar SEN
President

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 11 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary